INDEX

	Page
Adoption of Petitioners' Statement of Case	1
Question Presented	1
Summary of Argument	1-4
Argument	5-14
Proof of Service	16

List of Authorities — Judicial Decisions

Page

Blackburn v. Portland Gold Mining Co., 175 U.S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222 7

California Powder Works v. Davis, 151 U.S. 389, 38 L. Ed. 206, 14 Sup. Ct. Rep. 350 8

Colorado Cont. Consol. Min. Co. v. Turck, 150 U.S. 138, 37 L. Ed. 1030, 14 Sup. Ct. Rep. 35 7

Defiance Water Co. v. Defiance, 191 U.S. 184, 48 L. Ed. 140, 24 S. Ct. 63 6

De Lamar's Nevada Gold Mining Co. v. Nesbitt, 177 U.S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715 8

Denver v. New York Trust Co., 229 U.S. 123, 57 L. Ed. 1101, 33 S. Ct. 697 6

First National Bank v. Williams, 252 U.S. 504, 64 L. Ed. 690, 40 S. Ct. 372 6

Florida C. & P. R. Co. v. Bell, 176 U.S. 321, 44 L. Ed. 486, 20 Sup. Ct. Rep. 399 7

Gully v. First National Bank 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 6

Hooker v. Los Angeles, 188 U.S. 314, 47 L. Ed. 487, 23 S. Ct. 395 8

Joy v. St. Louis, 201 U.S. 332, 50 L. Ed. 776, 26 S. Ct. 478 6

King County v. Seattle School Dist., 263 U.S. 361, 68 L. Ed. 339, 44 S. Ct. 127 6

Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656 ..... 7, 8

List of Authorities—Judicial Decisions Cont'd.

Page

New Orleans v. Benjamin, 153 U.S. 411, 38 L. Ed. 764, 145 S. Ct. 905 6

Robinson v. Anderson, 121 U.S. 522, 30 L. Ed. 1021, 7 S. Ct. 1011 9

San Francisco v. Scott, 111 U.S. 768, 28 L. Ed. 593, 4 Sup. Ct. Rep. 688 8

Shoshone Min. C. v. Rutter, 177 U.S. 505, 44 L. Ed. 864, 20 Sup. Ct. Rep. 726 ..... 7, 8

Shulthis v. McDougal, 225 U.S. 561, 56 L. Ed. 1205, 32 S. Ct. 705 7

Starin v. New York, 115 U.S. 248, 29 L. Ed. 388, 6 S. Ct. 28 6

Taylor v. Smith, CCA 7th, 167 Fed. 2d 791, 12 ALR 2d 1 6

Treaty

Treaty of Amity Settlements and Limits 2, 5

Statutes

Title 28 USCA Section 1331 1

Act of May 8, 1822 (2 Statute 709) 2, 4, 5

Act of Feb. 8, 1827 (4 Statute 202) 4, 5

Miscellaneous:

12 ALR 2d 5 to 74 14

Vol. 4 American State Papers, Public Lands page 406, No. 20 2

NOTE.—The respondents, being satisfied with the petitioners' references to the "Opinion Below," "Jurisdiction," "Statute Involved," and "Statement of the Case," hereby accept them.

QUESTION PRESENTED

Although the petitioners present for review three proposed questions, these respondents cannot accept the question or questions before this Court as being as presented by the petitioners but as being more properly stated as follows:

> Do the allegations of the Complaint present merely a question of land boundaries, or a question arising under the Constitution, laws or treaties of the United States within purview of section 1331(a), title 28, of the United States Code?

It is the contention of the respondents that nothing more than land boundaries is presented by the petitioners' Complaint filed in the District Court.

SUMMARY OF ARGUMENT

The answer to the question of jurisdiction of the District Court of this case revolves around a construction of the following portion of section 1331, title 28, of the United States Code, as that section provided at the time this action was commenced on November 10, 1958, to wit:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and *arises under*

the Constitution, laws or treaties of the United States." (Emphasis supplied)

For the court to have jurisdiction under this statutory provision, the cause of action, that is, the question for determination of the case, must arise under some constitutional, statutory or treaty provision of the United States, not be merely a question of the location of a land boundary.

On April 5, 1816, the King of Spain granted to Andrew Atkinson, by Royal Title, a parcel of land in East Florida, described as being:

> "A tract of land consisting of four hundred fifty acres, more or less, on the St. Johns River, at the place known by the name of King's Plantation or the Shipyard, joining on the north with the St. Johns River; on the south with pine land; on the east with a creek, which divides said lands of Vincent Ferrer; and on the west with the swamp of the said river St. Johns." (Vol. 4, American State Papers, Public Lands, Duff Green Edition, page 406, No. 20.)

This tract of land is sometimes referred to as the "Andrew Atkinson Grant." The Treaty of Amity, Settlement and Limits, between the King of Spain and the United States, by Article VIII thereof, required that "all grants of land made before the 24th of January 1818 . . . shall be ratified and confirmed to the person in possesson of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of" Spain. Subsequent to the effective date of said treaty, the Congress of the United States, by its Act of May 8, 1822, (2 Stat. 709) made provision for, and set up the procedure to be followed, in ratifying and confirming Spanish grants of land in the Floridas prior to January 24, 1818, includ-

ing the setting up of a Commission to receive applications for ratification and confirmation of such claims, to determine what disposition should be made of such applications, and to report their findings and recommendations to the Congress of the United States. This the said Commission did as to the said Andrew Atkinson grant, finding it valid and binding on the United States under and pursuant to said article VIII of the said Treaty of Amity, Settlement and Limits, and recommending to the Congress that the said grant be recognized and confirmed. The said Andrew Atkinson grant was approved and confirmed by the said Commission and by the Congress of the United States by its Act of February 8, 1827 (4 Stat. 202).

Under section 7 of said Act of February 8, 1827, it was made the duty of the keepers of the public archives of the Floridas to furnish "the surveyor of public lands in Florida, without delay, a description of each claim to land, which shall have been confirmed, which shall specially designate the quantity, locality and connection of such claim; and where the confirmation may have been made on a grant or survey, a copy of the courses and distances contained in such grant or survey, and the date of the survey or grant; and it shall be the duty of the surveyor of public lands in Florida, *to cause*, under such instructions as he may receive from the Treasury Department, *the said claims to be surveyed*, and connected with the township lines of the public surveys, and to give to them their proper township and sectional numbers, agreeably to such descriptions; and he shall make separate plats and certificates of survey of the same, one of which shall be returned to the office of the register of the land office for the district in which the land may lie, and the other shall be delivered to the claimant. But it shall be

the duty of the surveyor to withhold his certificate, if he shall have reason to believe that the lands claimed are other lands than those intended to be confirmed; or if it shall appear that the survey, under which the land is claimed, has been made subsequent to the date of the survey under which the claim was confirmed." (Emphasis supplied.)

These proceedings and Congressional action deal with a parcel of land and the identification and location of it. The existence and the operation of the Treaty of Amity, Settlement and Limits, the Act of Congress of May 8, 1822 (2 Stat. 709) and the Act of Congress of February 8, 1827 (4 Stat. 202), are admitted and their construction is not necessary to a determination of the question of the rights of the parties. The question is one of ascertaining and determining the extent of the lands granted to Andrew Atkinson by the King of Spain on April 1, 1816. The petitioners contend that its boundaries extend to and embrace the area claimed by them, and the respondents contend that it extends to a lesser area. The contention of both parties relate to land boundaries, not to a construction or application of the said treaty or the said Acts of Congress, or either of them. The purpose and intention of the said Acts of Congress, including the survey to be made thereunder, was the establishment of the title and boundaries of the land. The two lower courts were correct in holding that only a question of land boundaries, and no question of the construction of the federal constitution, or any act or treaty, was involved, and that the District Court was without jurisdiction of the cause.

ARGUMENT

THE COMPLAINT OF THE PETITIONERS FILED IN THE DISTRICT COURT INVOLVES MERELY AND ONLY A QUESTION OF LAND BOUNDARIES AND NOT ONE OF THE CONSTRUCTION OF THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES.

The Treaty of Amity, Settlement and Limits between the King of Spain and the United States by article VIII thereof, required that the United States recognize as valid grants made by Spain prior to January 24, 1818, which, under the laws of Spain, would have been recognized had there been no change of national title. This constitutional provision was deemed applicable to the Andrew Atkinson grant of April 5, 1816, described in the Complaint filed in the District Court. This grant, pursuant to the act of May 8, 1822, was duly considered, approved and fully recognized as valid, by the Commission provided by the said Act, which action of the said Commission was recognized and approved by the Act of Congress of February 8, 1827, subsequent to which it was duly surveyed as required by said Act of 1827.

A reading of the Complaint clearly shows a dispute as to the location of the boundaries of the Andrew Atkinson grant. Its location and boundaries were established and fixed by the proceedings had under the said acts of May 8, 1822 and February 8, 1827, which boundaries must be presumed to have beeen surveyed by the government surveyor as directed by the Act of February 8, 1827. If the said government surveyor made an error in running the boundaries of the said tract of land, it was the fault and error of the surveyor and not of the Treaty of Amity, Settlement and Limits.

or the acts of May 8, 1822 or of February 8, 1827. The case does not arise under the Constitution, laws or treaties of the United States.

In *Gully v. First National Bank*, 299 U.S. 109, text 112 and 113, 57 S. Ct. 96, 81 L. ed. 70, text 72, Mr. Justice Cardozo, writing for the Court, said that:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books, some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. Starin v. New York, 115 U.S. 248, 257, 29 L. Ed. 388, 390, 6 S. Ct. 28; First Nat. Bank v. Williams, 252 U.S. 504, 512, 64 L. Ed. 690, 692, 40 S. Ct. 372. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Ibid.; King County v. Seattle School Dist. 263, U.S. 361, 363, 364, 68 L. Ed. 339-341, 44 S. Ct. 127. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (New Orleans v. Benjamin, 153 U.S. 411, 424, 38 L. Ed. 764, 769, 14 S. Ct. 905; Defiance Water Co. v. Defiance, 191 U.S. 184, 191, 48 L. Ed. 140, 143, 24 S. Ct. 63; Joy v. St. Louis, 201 U.S. 332, 50 L. Ed. 776, 26 S. Ct. 478; Denver v. New York Trust Co. 229 U.S. 123, 133, 57 L. Ed. 1101, 1120, 33 S. Ct. 697 . . . .)"

In *Taylor v. Smith*, CCA 7th, 167 Fed. 2d 797, 12 A.L.R. 2d 1, text 4, the court said:

> "To bring the case within the statute the right created by the laws of the United States must be an essential element of plaintiffs' cause of action. The right must be such that it will be supported if the laws of the United States are given one con-

struction or effect, and defeated if they receive another. but a genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto." Citing Gully v. First National Bank, supra.

And,

" . . . before the jurisdiction of the District Court can be maintained on the ground that a federal question is involved, it must appear that the federal question is one in substance and not in mere assertion and 'this must appear from the plaintiff's statement of his own claim . . . .'"

The case of *Shulthis v. McDougal* (1912), 32 S. Ct. 705, 225 U.S. 561, 56 L. ed. 1205, text 1211, involved conflicting claims to a tract of land alloted to the Creek Indians and the Court speaking through Mr. Justice Van Devanter, had this to say:

"3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise, as all title in those states are traceable back to those laws. Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 24 L. Ed. 656; Colorado Cent. Consol. Min. Co. v. Turck, 150 U.S. 138, 37 L. Ed. 1030, 14 Sup. Ct. Rep. 35; Blackburn v. Portland Gold Min. Co. 175 U.S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358; Florida C. & P. R. Co. v. Bell, 176 U.S. 321, 44 L. Ed. 486, 20 Sup. Ct. Rep. 399; Shoshone Min. Co. v. Rutter.

177 U.S. 505, 44 L. Ed. 864, 20 Sup. Ct. Rep. 726; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U.S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715."

In *Hooker v. Los Angeles*, 168 U.S. 314, 23 S. Ct. 395, 47 L. Ed. 487, it was contended that the decision of the state court against the claim of plaintiffs in error to certain riparian rights and in certain alleged percolating waters, which rights were alleged to be derived from a patent of the United States, and confirmed Mexican grants, was a decision against a title, right, privilege, or immunity claimed under the Constitution or some statute or treaty of the United States and so reviewable here. But this Court held otherwise, and said:

"Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law; on which the decision of the state court was final. San Francisco v. Scott, 111 U.S. 768, 28 L. Ed. 593, 4 Sup. Ct. Rep. 688; California Powder Works v. Davis, 151 U.S. 389, 38 L. Ed. 206, 14 Sup. Ct. Rep. 350."

Mr. Justice Brewer in *Shoshone Mining Co. v. Rutter and Bradley* (1900), 177 U.S. 505, 20 S. Ct. 726, 44 L. Ed. 864 in speaking of the constitutional provisions relating to the jurisdiction of Federal Courts and the Congressional authority concerning Federal jurisdiction, said:

" . . . It has so constructed the judicial system of the United States that the great bulk of litigation respecting rights of property, although those rights may in their inception go back to some law of the United States, is in fact carried on in the courts of the several states . . . "

and then quoted from Little York Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203, 24 L. Ed. 656, 658:

" ' "The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must, in some form, appear upon the record, by a statement of facts, 'in legal and logical form', such as is required in good pleading, . . . that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States." ' "

The case of *Robinson v. Anderson* (1887), 121 U.S. 522, 30 L. Ed. 1021 is peculiarly applicable to the case at bar as the Court, through Mr. Chief Justice Waite, said:

" 'This is a writ of error sued out under section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L. 470, for the review of an order of the circuit court dismissing a suit brought by Robinson, a citizen of California, against other citizens of the same State, for want of jurisdiction. The claim on the part of the plaintiff in error is that upon the face of the complaint it appears that the suit is one arising under the Constitution or laws or treaties of the United States, and that consequently the circuit court had jurisdiction by reason of the subject matter of the action; but on examination we find that, according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of the Rancho Los Bolsas, granted by the Mexican Government to Manuel Nieto, and confirmed and patented to his representatives by the United States under the Act of March 3, 1851, Chap. 41, 9 Stat. at L. 631, "to ascertain and settle the private land claims in the State of California." Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of

confirmation, and it nowhere appears that either the Constitution or any law or treaty of the United States is involved in this.'

* * *

" 'Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be; and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on. The circuit court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially, if, as here, they were evidently made, "for the purpose of creating a case" cognizable by the circuit court, when none in fact existed . . . . ' "

From the above and foregoing authorities the rule appears that an action having for its purpose the enforcement of a right which finds its origin in the Constitution, treaties or laws of the United States is not necessarily and for that reason alone one arising under such Constitution, treaties and laws. An action arises under the Constitution, treaties or laws of the United States, or presents a federal question, where and only where it involves a question with respect to the construction or effect of the Federal Constitution, or with respect to the validity, construction, or effect of an act of Congress or a treaty, the determination of which is

necessary to a correct decision, or involves some right, title, privilege or immunity which will be sustained if the Constitution, treaties or laws of the United States are given one construction, and defeated if they receive another construction. Would the right of the petitioners to the land area claimed in their Complaint be sustained if article VIII, of the Treaty of Amity, Settlement and Limits, between the King of Spain and the United States, and the Acts of Congress of May 8, 1822 and of February 8, 1827, are given one construction and would such right of the petitioners be defeated if they are given another? These respondents submit that the petitioners' claim depend upon the boundaries of the said Andrew Atkinson grant, and not on the construction of the said treaty and acts of Congress or any of them.

The respondents contend that there are no positive allegations or facts in the Complaint which affirmatively show that a construction of the Treaty or the Acts of Congress are necessarily involved or required. The Treaty, and the Acts of Congress made pursuant thereof, are the sources of Andrew Atkinson's title, the original claimant. There are no factual allegations in the Complaint to the effect that the mandates of the Treaty have not been complied with. Neither are there any factual allegations in the complaint to show that the Acts of Congress of May 8, 1822 or of February 8, 1827 have not been complied with. The petitioners assert, however, that their rights require a construction of said Treaty and said Acts of Congress; that their rights will be supported if the treaties and laws are given one contruction or effect, and defeated if they receive another. These allegations are merely conclusions of the pleader. The Treaty required that the United States would recognize grants of land made be-

fore the 24th day of January, 1818 by his Catholic Majesty to claimants in possession, and, that the same would be ratified and confirmed to such claimants. Nothing can be gleaned from the pleading that this was not done. Since the Act of Congress of February 8, 1827 required that a survey of the private claims be made, and also required the issuance of patents to such claimants, after survey, it would seem reasonable that a patent must have been issued, although the plaintiffs made no mention of the issuance of a patent in the deraignment of their title (R. 4). Under the Treaty and said Act of Congress, we believe that after the lapse of more than 130 years the Court will indulge the presumption that the legal processes of acquiring title were complied with and that all things were done to secure to the claimant Andrew Atkinson title to lands which he claimed under the grant papers and which lands he was in possession.

The description of "Parcel A", referred to in the Complaint, is not tied to any survey or map other than the Extension Survey of 1949. The fact that an Extension Survey was made in 1949, as alleged in the Complaint, is sufficient to show that "Parcel A", which plaintiffs now claim, was not shown on the Township map or survey of 1851. The reason that "Parcel A" was not shown on the map or survey of 1851 can only be surmised. It was the duty of the public surveyor, in making surveys and maps of the Township, from his field notes, to show the position of the lands that were surveyed. "Parcel A", not having been shown on the 1851 map or survey, being shown for the first time on the Extension Survey of 1949, could not, therefore, have been determined by the public surveyor to have been part of the original grant.

The petitioners in their alleged claim of ownership of "Parcel A", deraign their title of the original grant from its confirmation down to the time when they received title. In this deraignment (R. 8) it is shown that the title to "said land" was quieted in a suit in the Circuit Court; that a Final Decree was entered in said cause on May 3, 1916. If it is the purpose of the petitioners to fix and determine the Northerly boundary of the grant as running to the river then, the question arises: what has happened to the Northerly boundary since the Final Decree in said Circuit Court, which Decree necessarily had to describe the boundaries of the lands, the title of which was quieted? The said confirmatory Act of Congress did not fix or definitize the northern boundary of the original grant. According to the terms of the Statute, a survey was required also the issuance of a patent was authorized upon a survey being made of the claim. Such survey necessarily had to be made of the lands of which the claimant was in possession in order to meet the requirements and provisions of Article VIII of the Treaty.

The paramount reason for requiring surveys to be made was in order to separate the private claims from the public domain. Pursuant to the requirements of said statute, surveys were accordingly made and returned to the General Land Office and became a part of the public records. These surveys of the private claims made pursuant to the statute necessarily had to be made of the lands which claimants were in possession of, in order to conform to the provisions of Article VIII of the Treaty. It is alleged in the Complaint that a survey of said Township, by Marcellus A. Williams, was made in the first quarter of 1851 and approved by the Surveyor General on October 25, 1851. The private claim of Andrew Atkinson, and other

claimants, are shown on this survey or map of said Township.

The Extension Survey of 1949, made by Oscar B. Walsh and Paul K. Russell, clearly shows the northern boundary of the Atkinson grant to be some distance from the lands having a position in said Extension Survey. "Parcel A" described in the Complaint was determined to be a part of the public domain of the United States. (R. 13) Therefore, it would appear that the case made by the Complaint is no more than a dispute with reference to a boundary. This was the conclusion reached by the District Judge, which was affirmed by the Court of Appeals. Petitioners argue, in their Brief, that for practical purposes, the sole basis of this suit under the Treaty and Acts of Congress is to have the river established as a boundary of the grant, and, that such right constitutes a federal question. They argue that with respect to their rights, there exists a dispute with respect to the construction, or effect, of the Constitution laws and treaties creating such rights. The respondents, on the other hand, contend that the Complaint does not by positive allegations of facts show the existence of a substantial right as would constitute a federal question.

The petitioners have failed, by their Complaint filed in the District Court, to show that the litigation "arises under the Constitution, laws or treaties of the United States." Only a question of the boundaries of the Andrew Atkinson grant is in issue.

NOTE: There appears in 12 A.L.R. 2d, on pages 5 to 74, an annotation on the question of "What actions arise under Constitution, laws and treaties of the United States; general principles."

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

FRED M. BURNS
ROBERT C. PARKER
Assistant Attorneys General

SID J. WHITE
Special Assistant
Attorney General

Capitol Building, Tallahassee,
Florida
Attorneys for the Respondents
Trustees of the Internal
Improvement Fund of Florida

J. HENRY BLOUNT
1325 Barnett National Bank Bldg.
Jacksonville, Florida
Attorney for Respondent
Duval County, Florida

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Herman Ulmer, Jr., Esquire, 1215 Barnett Bank Building, Jacksonville 2, Florida, Attorney for Petitioners, by mail, this ..... day of May, A.D. 1961.

FRED M. BURNS